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No. 26

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

ALCEA BAND OF TILLAMOOKS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Supreme Court of the United States

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No. 387

UNITED STATES OF AMERICA, PETITIONER

v.

ALCEA BAND OF TILLAMOOKS, ET AL.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment entered in this case on April 2, 1945, by the Court of Claims.

OPINION BELOW

The opinion of the Court of Claims (R. 61–83) is reported in 59 F. Supp. 934.

[1] Besides the Alcea Band of Tillamooks, the respondents are the Yah-Quo-Nah, Seletca and Ne-A-Ches-Na Bands of Tillamooks; the Quans-Sake-Nah; Klen-Nah-Hah, Ke-Ah-Mas-E-Ton, Cah-Toch, Chin-Chen-Ten-Tah-Ta, Whiston, and Klen-Hos-Tun Bands of Nas-O-Mahs or Coquilles; the Chetco Tribe; the Ko-Se-E-Chah, Se-Qua-Chee, Too-Too-To-Ny, Yah-Shute, Whis-To-Natin, Cos-Sa-To-Ny, Chet-Less-Ing-Ton, Port Orford, Eukie-Chee, Kus-So-To-Ny, Kler-It-La-Tel, Te-Cha-Quot, and Mack-A-No-Tin Bands of Too-Too-To-Neys; and portions and descendants of all such tribes and bands (R. 1).

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on April 2, 1945 (R. 84). A motion by the United States for a new trial was denied on June 4, 1945 (*ibid.*). The jurisdiction of this Court is invoked under Section 1 of the jurisdictional Act of August 26, 1935, 49 Stat. 801, and Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 28 U. S. C. sec. 288 (b).

QUESTIONS PRESENTED

1. Whether the extinguishment of unrecognized original Indian title by the United States creates a legal or equitable obligation so that respondents could recover under the special jurisdictional Act.

2. Whether respondents' original Indian title was formally recognized by the United States.

STATUTES INVOLVED

The pertinent portions of the jurisdictional Act of August 26, 1935, 49 Stat. 801, are as follows:

> * * * That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment * * * (D) [in] any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their

appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua, and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast Range, the Grande Ronde, and the Siletz Reservations in said Territory.

SEC. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; * * *.

Section 1 of the Act of August 14, 1848, 9 Stat. 323, "An Act to establish the Territorial Government of Oregon," provides in part:

> That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the government of

> the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed.

Other statutes are set out in the findings of the Court of Claims.

STATEMENT

Pursuant to the Act of August 26, 1935, 49 Stat. 801, *supra*, pp. 2–3, which conferred jurisdiction on the Court of Claims to adjudicate "legal and equitable claims arising under or growing out of the original Indian title," tribes or bands of the Tillamook, Coquille, Too-Too-To-Ney, and Chetco Indians brought this suit to recover compensation for the alleged taking of lands in which the tribes asserted possessory rights by virtue of original Indian title, as opposed to a recognized right of occupancy (R. 1–20).[2] Each of the four tribes, who lived principally along the rivers and creek banks (Finding 11, R. 39), alleged title solely by virtue of exclusive occupation and use to large areas in the State of Oregon between the Pacific Ocean and the Coast Range of Mountains (R. 4, 5–6). According to statistics of the General Land Office

[2] Several other tribes also joined in the suit, but since the claims of these Indians have been dismissed for various reasons (R. 61, 62–69), only the claims of the Tillamooks, Coquilles, Too-Too-To-Neys, and Chetcos are involved in this petition for certiorari.

of the Department of Interior, the territory so claimed by the Tillamooks (Finding 8, R. 37) has been estimated to embrace approximately 1,152,410 acres (see Finding 5, R. 35), while that claimed by the Coquilles (Finding 10, R. 38–39) consists of about 722,530 acres. The area occupied by the Too-Too-To-Neys and Chetcos (Finding 9, R. 37–38) has been estimated as approximately 897,640 acres.[3] The claims of the four tribes were based upon the following facts as found by the Court of Claims:

In 1855, acting under the authority of the Act of June 5, 1850, 9 Stat. 437, the Superintendent of the Oregon Indian Agency negotiated a treaty with respondents and other tribes (Findings 2, 3, 4, R. 24–25, 28, 32). By this treaty the Indians agreed to cede to the United States all the lands to which they claimed title, provided that a described portion of the ceded lands be set aside "until otherwise directed by the President" as a residence for the signatory Indians and "such other bands or parts of bands as may, by direction of the President of the United States, be located thereon" (Finding 3, R. 29). The agreement also provided for cash payments and the undertaking of other

[3] In 1855 the Too-Too-To-Neys, Chetcos, and Coquilles had an aggregate population of about 1,311 (Finding 5, R. 35), while the Tillamooks numbered about 200. See Sen. Doc. No. 11, pt. 1, 35th Cong., 1st sess., pp. 642, 645. Thus, the alleged holding of the Tillamooks averaged about 5,750 acres for each member of the tribe, while for the four tribes the average was approximately 1,800 acres.

obligations by the United States as consideration for the cession (Finding 3, R. 30–31). This treaty was never ratified by the Senate (Findings 2, 4, R. 26, 32–34). However, by Executive Order of November 9, 1855, a conditional reservation, to be subject to future curtailment if found proper, was set aside for the use of those Indians who had signed the treaty and such other tribes as the President might designate (Finding 13, R. 40–47). This reservation, known as the Coast or Siletz Reservation, consisted of a long strip of land about 120 miles north and south by 20 miles east and west and contained approximately 1,100,000 acres (Finding 15, R. 48). This tract was composed in part of a portion of the lands exclusively occupied by bands of Tillamooks, and its boundaries were almost the same as those of the reservation described in the treaty (Findings 12, 16, R. 39, 48). Respondent bands and other tribes were immediately removed to the reservation (Findings 3, 12, 19, 37, R. 28, 39, 49–50, 59–61), and the remaining lands in the area described in the treaty were opened for settlement as public lands of the United States (Finding 18, R. 49).

By Executive Order of December 21, 1865, a strip of approximately 320,000 acres was withdrawn from the center of the reservation and was immediately opened for settlement, the Indian occupants being removed to the diminished reservation (Finding 21, R. 50–51). By the Act of March 3, 1875, 18 Stat. 420, 446, Congress ratified the Executive Orders of 1855 and 1865 and further

diminished the reservation by withdrawing tracts located at the north and south ends of the original reservation (Finding 22, R. 51–52). The Indian occupants were removed to portions of the diminished reservation, and the newly withdrawn lands were opened for settlement (Finding 22, R. 52). Up to this time respondents had not received any compensation for the lands to which they claimed original Indian title (Findings 12, 19, R. 39–40, 50).

After 1887 allotments of land were made to Indians of respondent and other tribes who were permanently located on the diminished Siletz Reservation (Finding 23, R. 53).[4] Thereafter, in 1892 the United States and the tribes residing on the reservation entered into an agreement, subsequently ratified by the Act of August 15, 1894, 28 Stat. 286, 323, by which the Indians ceded 178,840 acres, all the unallotted lands except for 5 sections within the diminished reservation, for a consideration of $142,600, part of which was immediately paid to the Indians per capita, with the balance of $100,000 being deposited at interest in the Treasury to the credit of the various bands located on the reservation (Finding 23, R. 53). These ceded lands were opened for settlement early in 1895 (*idem.*). In 1900 Congress provided for the distribution of the $100,000 on deposit,

[4] Only 594 Indians, including members of respondent bands and other tribes, claimed allotments. Report of Commissioner of Indian Affairs (1894), p. 267.

together with accrued interest, to individual Indians residing on the reservation (Finding 24, R. 53). In 1910 Congress authorized the sale of the remaining 5 sections, and in 1916 the proceeds of such sale, after deductions for expenses incurred, were distributed per capita to enrolled members of the resident tribes (Findings 25, 26, R. 53–54).

Under these circumstances the United States contended that it had not recognized or acknowledged that respondent tribes or bands had any right of occupancy in the areas claimed by them, that consequently respondents had no legal or equitable interest in the lands as against the United States, and that, therefore, the court had no jurisdiction to award recovery for the extinguishment of the Indian title. The Court of Claims overruled this contention, being of the opinion that even absent a recognition of a right of occupancy, respondents had such a legal interest in lands exclusively occupied from time immemorial that the lands could not be taken by the United States without payment of just compensation therefor (R. 70–77). The court also held that even if direct recognition of Indian title were necessary to support recovery, the requisite recognition was furnished by the Act of August 14, 1848, 9 Stat. 323, *supra*, pp. 3–4, which declared that the rights of Indians to property in Oregon were protected until extinguished by the United States (R. 74–75).

The Court of Claims found that each of respondent tribes possessed Indian title, by virtue of exclusive occupancy from time immemorial, to areas with clearly defined boundaries as alleged in the petition (Findings 6, 7, 8, 9, 10, 11; R. 35–39). The court also found that these lands had been taken by the United States for a public purpose on or shortly after the issuance of the Executive Order of November 9, 1855, without the payment of just compensation (Findings 17, 18, 34, R. 49, 58), and concluded that the tribes were entitled to recover (R. 61). It was indicated that the recovery was to be measured by the value of the lands as of November 9, 1855, plus interest at a reasonable rate, but that this recovery should be offset by the value as of November 9, 1855, of those portions of the reservation in which the tribes were recognized to have had a beneficial interest through allotments in severalty and the distribution per capita of the proceeds of the unallotted lands remaining on the reservation as it existed in 1894 (R. 82–83). On April 2, 1945, an interlocutory judgment was entered holding respondents entitled to recover, but the determination of the amount of recovery and the amount of any offsets was reserved for further proceedings under Rule 39 (a) of the Court of Claims (R. 84).[8] The opinion, entered the same day, was

[8] Rule 39 (a) of the Court of Claims provides:

"In every Indian case, unless otherwise ordered by the court or stipulated by the parties, the hearing in the first

written by Judge Littleton, Chief Justice Whaley dissenting without opinion and Judge Jones taking no part (R. 83). On June 4, 1945, a motion by the United States for a new trial was denied (R. 84).

REASONS FOR GRANTING THE WRIT

1. In arriving at its decision that respondents were entitled to recover, the Court of Claims assumed that the jurisdictional Act, conferring as it did jurisdiction to adjudicate "legal and equitable claims arising under or growing out of the original Indian title," authorized the entry of judgment for compensation if the claim of Indian title at and long prior to 1855 should be established (R. 21). This assumption is contrary to the established precedents of this Court, for it is well settled that a special jurisdictional Act does not admit any legal liability, but merely provides "a forum for the adjudication of the claim according to applicable legal principles." *United States* v. *Mille Lac Chippewas*, 229 U. S. 498, 500; *Turner* v. *United States*, 248 U. S. 354, 358; *Shoshone Tribe* v. *United States*, 299 U. S. 476,

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instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the court shall enter its judgment adjudicating that right. If the court holds in favor of the plaintiff, the judgment shall be in the form of an interlocutory order, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings. After the entry of such an interlocutory order, either party may move for a new trial under the provisions of Rules 91 to 97, inclusive."

493. The meager legislative history of the present Act indicates that no deviation from the settled rule of construction was intended, but that respondents were merely to be afforded an opportunity for a judicial determination as to whether any legal rights were violated by the extinguishment of their original Indian title. S. Rep. No. 795, 74th Cong., 1st. sess. Hence, it is clear that no implication of liability can be drawn from the special jurisdictional Act.

2. This case is the first in which it has been held that the United States was under a legal obligation to make compensation for the extinguishment of original Indian title, as opposed to a formally recognized right of occupancy.[8] The holding was

[8] Although the United States has several times submitted to suit on claims based solely on original Indian title, until the present decision it had never been determined that the United States had violated any legal rights by destroying such title. In three cases the Court of Claims found it unnecessary to pass upon the Government's liability as a matter of law because of the holding that Indian title had not been established by the evidence. *Assiniboine Indian Tribe* v. *United States*, 77 C. Cls. 347, 370; *Coos Bay Indian Tribe, et al.* v. *United States*, 87 C. Cls. 143, certiorari denied, 306 U. S. 653; *The Wichita Indians, et al.* v. *United States*, 89 C. Cls. 378, 414. (Cf. R. 75–77 for a discussion of these cases.) But in *Duwamish, et al. Indians* v. *United States*, 79 C. Cls. 530, 532, 597–603, certiorari denied, 295 U. S. 755, the court apparently flatly held as the first ground for dismissal that even where the jurisdictional Act covered claims based on original Indian title, no recovery could be had absent recognition of such title. (Cf. R. 76 for a contrary interpretation of this opinion.) In *The Indians of California* v. *United States*, 98 C. Cls. 583, 599, certiorari denied, 319 U. S. 764,

based upon the reasoning that Indian title was just as much protected against action of the United States as was a recognized right of occupancy, so that it could be extinguished only by purchase (R. 70–73). However, it is submitted that, although the Fifth Amendment may require compensation for the deprivation of a formally recognized right of occupancy (see *Shoshone Indians* v. *United States,* 324 U. S. 335, 340), the extinguishment of original Indian title creates at most only a moral obligation.

"Since *Johnson* v. *M'Intosh,* 8 Wheat. 543, decided in 1823, gave rationalization to the appropriation of Indian lands by the white man's government, the extinguishment of Indian title by that sovereignty has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss." *Shoshone Indians* v. *United States,* 324 U. S. 335, 339. As a political matter, the right of occupancy proceeding from Indian title was protected until determined by the United States. *United States* v. *Santa Fe Pacific R. Co.,* 314 U. S. 339, 345; *Clark* v. *Smith,* 13 Pet. 195, 201. But, although as to private individuals Indian title was as sacred as the fee of the whites, its extinguish-

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recovery was granted, but this was on the basis of a provision in the jurisdictional Act declaring that "the loss to the said Indians on account of their failure to secure the lands and compensation provided for in the eighteen unratified treaties is sufficient ground for equitable relief."

ment by the Government raised political rather than justiciable issues. This was so whether the title be determined by treaty, purchase, the sword, or the exercise of complete dominion adverse to the Indian claim. *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347; *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 66; *Beecher* v. *Wetherby*, 95 U. S. 517, 525; *Johnson* v. *McIntosh*, 8 Wheat. 543, 586. In its dealings with Indian title, as Mr. Justice Holmes stated, the United States "bound itself only by honor, not by law." *Conley* v. *Ballinger*, 216 U. S. 84, 90; see also *Beecher* v. *Wetherby*, 95 U. S. 517, 525; cf. *Cummings* v. *Deutsche Bank*, 300 U. S. 115. Hence, on long-established principles respondent tribes had no such legal interest in the lands here involved as to require compensation when devoted to a public purpose.

Because the Indians may have had rights protected by the courts against interference by private individuals, it does not follow that they had legal or equitable rights against the United States. The situation is not unique. At the time of the alleged taking, the fee to the lands involved was in the United States, while respondents had merely an unrecognized right of occupancy which was subject to determination by the Government. *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55, 56; see Cohen, *Handbook of Federal Indian Law* (1941), p. 294. Thus, respondents were in the

same position as persons impliedly licensed to graze their stock on the public lands or to take possession of lands not yet opened to settlement. Such persons, although having enforceable rights against others, had no legal or equitable rights protected against the acts of the sovereign owner. *Buford* v. *Houtz*, 133 U. S. 320; *Osborne* v. *United States*, 145 F. 2d 892 (C. C. A. 9); *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260; *Frisbie* v. *Whitney*, 76 U. S. 187, 194.

The court below (R. 73–74) principally relied upon language of this Court in *United States* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339. But in the portion quoted, this Court was speaking of the rights as against third parties, not as against the United States. Immediately following the language relied upon by the court below, this Court stated (314 U. S. at p. 347): "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. * * * And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." Thus, rather than supporting the decision of the Court of Claims, the *Santa Fe* case is contrary to it.

3. The Court of Claims attempted to buttress its decision by holding that in any event the Act

of August 14, 1848 (*supra*, pp. 3–4) amounted to a recognition of the Indian title (R. 74). But that statute, as appears when the sentence partially quoted by the court is read in its entirety, is nothing more than a declaration of the historic policy of protecting Indian title against encroachment by settlers and other private interests, with a complete reservation of all the Government's rights. The language used manifestly is not sufficient to support a finding of recognition. Cf. *Shoshone Indians* v. *United States*, 324 U. S. 335. The court's reliance upon an 1855 opinion of the Attorney General (R. 74–75) is subject to the same criticism, and in addition it is not clear how the Attorney General can be substituted for Congress in formally recognizing Indian title. Moreover, the court's holding that the 1848 Act amounted to a recognition is obviously inconsistent with its finding (Finding 35, R. 58; see R. 82–83) that Congress had not recognized any tribal rights in the 1855 Siletz Reservation until 1894.[7] If the Act of

[7] The Act of August 15, 1894, 28 Stat. 286, 323, sec. 15, ratified the Indians' 1892 cession to the United States of all unallotted land within the Siletz Reservation with the exception of 5 sections (R. 53). This action constituted a relinquishment by the respondents of all claims to lands outside the five sections—a voluntary extinguishment of Indian title. Cf. *United States* v. *Sante Fe Pacific R. Co.*, 314 U. S. 339, 356–358. The remaining 5 sections were sold pursuant to Congressional authorization in 1910 and the proceeds were distributed to members of the resident tribes (see Statement, *supra*, p. 8).

March 3, 1875 (R. 51–52) was not a recognition by Congress of definite rights in the reservation, surely the 1848 Act cannot be said to be a recognition of Indian title in any specified area.

4. The questions presented are of large importance to the United States and to Indian tribes such as respondents whose claims to rights of occupancy have never been recognized by treaty, agreement, or statute. The decision in the present case newly, and, we believe, mistakenly, places upon the Government a great liability, which might become enormous under similar jurisdictional Acts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD JUDSON,
Acting Solicitor General.

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